IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 21, 2005

PHILLIP B. FLOWERS, SR., ET AL. v. HCA HEALTH SERVICES OF TENNESSEE, INC., d/b/a SOUTHERN HILLS MEDICAL CENTER

Appeal from the Circuit Court for Davidson County
No. 01C-3478 Barbara N. Haynes, Judge

No. M2004-02126-COA-R9-CV - Filed March 14, 2006

This is an interlocutory appeal arising out of a medical negligence action filed by Phillip Flowers and his children against HCA Health Services of Tennessee. Flowers and his children brought an action for medical negligence against HCA for the death of Edith Flowers, wife and mother, who died due to a morphine overdose while under the care of HCA's employees at Southern Hills Medical Center. Plaintiffs' negligence action was based in part on the doctrine of res ipsa loquitur. HCA filed a motion to summarily dismiss the res ipsa loquitur claim, contending Plaintiffs could not prevail on that claim due to their concession the morphine pump was not defective. The trial court granted HCA's motion for summary judgment as to that issue. We now reverse.

Tenn. R. App. P. 9 Appeal as of Right; Judgment of the Circuit Court Reversed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Daniel L. Clayton, Nashville, Tennessee; and Steven R. Walker, Memphis, Tennessee, for the appellants, Phillip B. Flowers, Sr., Amy Flowers Smith, Phillip B. Flowers, Jr. and Christopher Flowers.

C. J. Gideon, Jr., Brian Cummings and Kenneth P. Flood, Nashville, Tennessee, for the appellee, HCA Health Services of Tennessee, Inc., d/b/a Southern Hills Medical Center.

OPINION

Edith Flowers was admitted to Southern Hills Medical Center to undergo a cystoscopy, an ureteroscopy, and a kidney stone extraction on January 9, 2001. She underwent the surgery following which there were no known complications. As is customary, she remained in the hospital to recuperate, during which stay she was given intramuscular injections of morphine to relieve pain. Despite the injections, she continued to experience pain to such an extent that she was placed on a

Patient Controlled Analgesic[1] (PCA) pump by which Mrs. Flowers could self-administer morphine via a hand-operated control, subject to programmed limitations of aggregate dosage.

Mrs. Flowers remained hospitalized the following day, January 10, and continued to experience and complain of pain throughout the day and evening. A nurse checked on Mrs. Flowers in the early morning hours of January 11, at which time Mrs. Flowers was found to be unresponsive and without a pulse. Efforts to resuscitate her proved unsuccessful, and she was pronounced dead shortly thereafter.

Plaintiffs timely filed this medical malpractice action against HCA, alleging that employees of HCA negligently administered an overdose of morphine to Mrs. Flowers and that the overdose caused her death. One of Plaintiffs' claims was based upon the doctrine of res ipsa loquitur. They contended the morphine pump was not defective and that the overdose and resulting death of Mrs. Flowers was the result of negligence by HCA's employees. HCA moved for summary judgment contending, in part, that Plaintiffs could not prevail on a res ipsa loquitur claim if the pump was not defective. The trial court heard Defendant's Motion for Summary Judgment three weeks before the scheduled trial date and agreed with HCA and summarily dismissed the claim.

Plaintiffs filed a Motion to Reconsider and a Motion for Interlocutory Appeal. The trial court denied the Motion to Reconsider stating that Plaintiffs could not maintain a cause of action under res ipsa loquitur if the pump was not defective. The trial court granted Plaintiff the right to this interlocutory appeal pursuant to Tenn. R. App. P. 9.

STANDARD OF REVIEW

Although the doctrine of res ipsa loquitur is a rule of evidence, *Quinley v. Cocke*, 192 S.W.2d 992,996 (Tenn. 1946), the issues were resolved in the trial court upon summary judgment. Thus, the standard of review applicable to summary judgment guides our review of this case.

Decisions based on summary judgment do not enjoy a presumption of correctness on appeal. *BellSouth Advertising & Publishing Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we first determine whether factual disputes exist. If a factual dispute exists, we then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993); *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998).

[1] An analgesic is a medication that relieves or reduces pain.

Summary judgment is proper in virtually all civil cases that can be resolved on the basis of legal issues alone, *Byrd v. Hall*, 847 S.W.2d at 210; *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001); however, it is not appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. The party seeking a summary judgment bears the burden of demonstrating that no genuine disputes of material fact exist and that party is entitled to judgment as a matter of law. *Godfrey v. Ruiz*, 90 S.W.3d at 695. Summary judgment should be granted at the trial court level when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion, which is the party seeking the summary judgment is entitled to a judgment as a matter of law. *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Webber v. State Farm Mutual Automobile Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001).

The court must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, discard all countervailing evidence, and, if there is a dispute as to any material fact or if there is any doubt as to the existence of a material fact, summary judgment cannot be granted. *Byrd v. Hall*, 847 S.W.2d at 210; *EVCO Corp. v. Ross*, 528 S.W.2d 20 (Tenn. 1975). To be entitled to summary judgment, the moving party must affirmatively negate an essential element of the non-moving party's claim or establish an affirmative defense that conclusively defeats the non-moving party's claim. *Cherry v. Williams*, 36 S.W.3d 78, 82-83 (Tenn. Ct. App. 2000).

ANALYSIS

The rule of evidence known as res ipsa loquitur comes to the aid of plaintiffs who have no direct evidence of a defendant's negligence, *Provident Life & Accident Ins. Co. v. Professional Cleaning Serv., Inc.*, 396 S.W.2d 351, 356 (Tenn. 1965), by providing a process for considering circumstantial evidence. *Poor Sisters of St. Francis v. Long*, 230 S.W.2d 659, 663 (Tenn. 1950). It permits, but does not require, a fact finder "to infer negligence from the circumstances of an injury." *Seavers v. Methodist Med. Ctr.*, 9 S.W.3d 86, 91 (Tenn. 1999); *Shivers v. Ramsey*, 937 S.W.2d 945, 949 (Tenn. Ct. App. 1996).

Though it is not frequently applied, the doctrine of res ipsa loquitur may be applied in a medical malpractice action. *Seavers*, 9 S.W.3d at 91-92. Although the use of res ipsa loquitur was previously restricted to the realm of cases within the common knowledge of the jury,[2] in 1999 our Supreme Court expanded its use by holding that "expert testimony may be used to establish a prima facie case of negligence under res ipsa loquitur." *Seavers*, 9 S.W.3d at 94-95 (overruling prior case law that prohibited the use of the doctrine if expert testimony was required). The court further explained that "res ipsa loquitur is no longer confined in Tennessee to the realm of cases within the 'common knowledge' of the jurors. Instead, res ipsa loquitur may be used in combination with expert

[2]Examples of common knowledge cases are those where a sponge is left in the patient's body following surgery or where the patient's eye is cut during an admission for an appendectomy. *See Rural Educ. Ass'n v. Bush*, 298 S.W.2d 761 (Tenn. Ct. App. 1956); *Meadows v. Patterson*, 109 S.W.2d 417 (Tenn. 1937).

testimony to raise an inference of negligence, even in those cases where expert testimony is required." *Seavers* at 98 (Order Denying Petition To Rehear).

The application of the doctrine was the only issue on appeal in *McConkey v. State*, 128 S.W.3d 656, 659-660 (Tenn. Ct. App. 2003), a medical malpractice action. The issue was whether the plaintiff satisfied his burden of proof under res ipsa loquitur. In its analysis, the court first noted that medical malpractice actions are governed by Tenn. Code Ann. § 29-26-115, which states the plaintiff shall have the burden of proving: the recognized standard of acceptable professional practice; the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and as a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred. The court then noted that in medical malpractice actions there shall be no presumption of negligence on the part of the defendant; "provided, there shall be a rebuttable presumption that the defendant was negligent where it is shown by the proof that the instrumentality causing injury was in the defendant's . . . exclusive control and that the accident or injury was one which ordinarily doesn't occur in the absence of negligence." *McConkey*, 128 S.W.3d at 659-660 (citing *Franklin v. Collins Chapel Connectional Hosp*., 696 S.W.2d 16, 19 (Tenn. Ct. App. 1985) (quoting *Sullivan v. Crabtree*, 258 S.W.2d 782, 783-84 (1953) (citation omitted)). The rebuttable presumption the court was referring to is of course the doctrine of res ipsa loquitur, which has been codified in Tenn. Code Ann. § 29-26-115(c). The doctrine as codified provides:

> [W]here the thing [causing the harm] is shown to be under the management of defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

Tenn. Code Ann. § 29- 26-115(c).

In the case before us, the few material facts which do not appear to be disputed are that Mrs. Flowers had in-patient surgery at Southern Hills Medical Center after which she remained hospitalized; post-surgery a nurse or nurses administered intramuscular injection(s) to relieve pain; a PCA pump was also provided to Mrs. Flowers for self-administration of morphine; the PCA pump was not defective, and in the early morning hours of January 11 Mrs. Flowers was found lying in her hospital bed unconscious and without a pulse, shortly after which she was pronounced dead. In addition to the foregoing, Plaintiffs provided evidence, which Defendants either dispute or do not admit, that the morphine in Mrs. Flowers blood system was above the lethal level and that her death was the result of an overdose of morphine.[3]

[3] One of Plaintiffs' contentions is that a nurse or nurses negligently administered bolus dose(s) of morphine after the PCA pump was provided. A bolus dose is a concentrated mass of a substance administered intravenously, which is typically administered by a health care practitioner, usually a nurse, as distinguished from a self-administered dose activated by the patient.

Plaintiffs rely in part on the autopsy report, which states the cause of death to be a morphine overdose. Defendants challenge the medical conclusion. The cause of death is a disputed and material fact. Whether the excessive dosage of morphine was due to the PCA pump or a bolus dose or doses of morphine administered by a nurse or nurses are likewise disputed.

The trial court summarily dismissed the res ipsa loquitur claim because Plaintiffs conceded the PCA pump was not defective. Thus, the issue before this court is whether Plaintiffs' concession that the PCA pump was not defective defeats their res ipsa loquitur claim. We have concluded it does not.

An instrumentality need not be defective to cause injury. The fact the PCA pump was working properly does not preclude negligence by an HCA employee. It is not essential that the "thing" or "instrumentality" be defective for res ipsa loquitur to apply.

> Where the evidence shows an injury inflicted, and also the physical thing inflicting it, and *that thing does not usually, or in the ordinary course, produce such a result where due care is exercised by those in charge of it*, it may be inferred that those so in charge of the thing inflicting the injury failed to exercise due care; that is, that they were guilty of negligence.

North Memphis Savings Bank v. Union Bridge & Construction Co., 196 S.W. 492, 496 (Tenn. 1917)(emphasis added). Plaintiffs' concession the pump functioned properly does not prevent them from being able to establish that the instrumentality causing injury was in Defendant's exclusive control, and that the accident would not have occurred absent negligence on the part of Defendant. *See Seavers*, 9 S.W.3d at 96.

For these reasons, we find the trial court erred in summarily dismissing Plaintiffs' res ipsa loquitur claim based on the concession the pump functioned properly. Finding Plaintiffs' res ipsa loquitur claim survives summary judgment, we remand for further proceedings consistent with this opinion. Costs of appeal are assessed against Appellee, HCA Health Services of Tennessee, Inc.

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FRANK G. CLEMENT, JR., JUDGE